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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

No. [redacted]169

ROBERT BOLIVAR DePUGH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit.**

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IN THE

# SUPREME COURT OF THE UNITED STATES.

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ROBERT BOLIVAR DePUGH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit.**

Petitioner, Robert Bolivar DePugh, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered April 15, 1968, affirming his conviction under 15 U. S. C., Sec. 902 (e), and that on hearing the judgment of conviction be reversed.

### OPINIONS BELOW.

The opinion of the Court of Appeals (App. 1) is not yet reported.

An opinion of the District Court overruling the defendant's Motion to Dismiss Indictment is reported, 266 F. Supp. 453 (App. 3).

## JURISDICTION.

The judgment of the Court of Appeals was entered on April 15, 1968. Timely Motion for Rehearing was filed, and was denied on May 9, 1968. This Court has jurisdiction under 28 U. S. C., Sec. 1254 (1).

## QUESTIONS PRESENTED.

1. Whether 15 U. S. C., Sec. 902 (e), in forbidding the transportation across state lines of firearms by persons under indictment, constitutes an infringement of the right to keep and bear arms in violation of the Second Amendment.

2. Whether 15 U. S. C., Sec. 902 (e) constitutes a discrimination against persons under indictment, and a prejudgment of guilt, all in violation of the Fifth and Sixth Amendments.

3. Whether 15 U. S. C., Sec. 902 (e) is properly construed as applying to a state indictment which is "fatally defective" and "not susceptible of amendment" under state law, and which is probably not in compliance with minimum due process standards.

4. If the answer to Question 3 is "yes," whether 15 U. S. C., Sec. 902 (e) is arbitrary and unreasonable and therefore presents a deprivation of property without due process of law, in imposing discriminatory sanctions against a person held to answer a void indictment.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

### Second Amendment.

A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

**Fifth Amendment.**

No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

**Sixth Amendment.**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**Section 564.580, Missouri Revised Statutes:**

"564.580. Possession or control of bomb prohibited—penalty. Every person who has in his possession or under his control a bomb or bombshell, or who carries or possesses any explosive substance with the intent to use the same unlawfully against the person or property of another, is guilty of a felony, and upon conviction therefor, shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than ten years. The terms 'bomb' and 'bombshell' as used in this section shall be held to

mean any device or object containing dynamite or any other explosive or highly combustible substance or chemical connected with a fuse, dynamite cap or other device or substance whereby such explosive or highly combustible substance or chemical may be ignited or exploded, and capable of causing bodily injury or death to persons, or damage or destruction to property; provided, that this section shall not apply to the lawful possession of bombs or bombshells by peace officers or by members of military forces in the regular discharge of their duties as such (R. S. 1939, No. 4818)".

**Title 15 U. S. C., Section 902 (e) (52 Stat. 1250 (1938), Ann. 75 Stat. 757 (1961)):**

"It shall be unlawful for any person who is under indictment or who has been convicted of a crime punishable by imprisonment for a term exceeding one year or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition."

## STATEMENT OF THE CASE.

The indictment, handed down August 20, 1966, charged the petitioner with transportation of a firearm in interstate commerce while under indictment in the State of Missouri on charges punishable by imprisonment for a term in excess of one year.

The state indictment attempted to charge violation of Mo. R. S., Sec. 564.580 and, omitting captions and signatures, reads as follows:

The Grand Jurors for the State of Missouri, duly summoned from the body of said County of Jackson,

being duly impaneled, sworn and charged to inquire within and for said County, upon their oaths present and charge that at the County of Jackson and State of Missouri, on or about the 9th day of July, 1965, one Robert B. DePugh, whose more true and full name is unknown to the members of the Grand Jury, did then and there unlawfully, wilfully and feloniously have in his possession and under his control various bombs and bomb shells; against the peace and dignity of the State.

Petitioner moved to dismiss the federal indictment on assigned grounds as follows: (a) failure to state an offense; (b) unlawful discrimination against persons who have been indicted but have not been convicted; and (c) invalidity of the state indictment. The District Court overruled these motions in an opinion dated January 27, 1967. (App. C, below.)

The case was called for trial on January 31, 1967. The Defendant entered a plea of *nolo contendere.* The District Attorney in his following statement to the court indicated that he had intended to establish his case by showing (i) the purchase by the defendant of a number of pistols in Iowa and (ii) subsequent possession by the defendant of one of these pistols in Missouri. The court sentenced the defendant to one year in jail, the sentence to run concurrently with the sentence on another charge. (The case in which the other sentence was imposed is pending and undisposed in the United States Court of Appeals for the Eighth Circuit.) At the time of sentencing a Motion to Dismiss the state indictment was pending and undisposed.

Following the filing of notice of appeal in this case the Circuit Court of Jackson County sustained a motion to dismiss the state indictment and quashed the proceedings. The opinion and order of this court is set out in Appen-

dix D. The court held as follows: "The indictment is fatally defective. . . ." It also held: ". . . Nor do we believe, that the indictment is susceptible of amendment by information in lieu thereof. . . ." The state proceedings were brought to the attention of the court below by a stipulation entered into by both parties.

We seek review of the affirmance of the conviction and sentence, and outright reversal of the conviction.

## REASONS FOR GRANTING THE WRIT.

1. 15 U. S. C., Sec. 902 (e), presents a patent violation of the Second Amendment, as to a person who is under indictment but unconvicted. He is denied the constitutional right to keep and bear arms, in a very substantial degree. The case is wholly unlike **United States v. Miller,** 307 U. S. 174 (1939), in which the weapon involved, a sawed-off shotgun, was found by the Court to have no use in the activities of the militia. Sec. 902 (e) applies to any weapon operated on the principle of explosive propulsion. **United States v. Tot** (D. C. N. J., 1941), 42 F. Supp. 252, reversed on other grounds, 319 U. S. 463 (1943).

The present statutory provision is not even limited to the person who crosses a state line with gun in hand. As the present proceedings show, it applies to any indicted person who causes the transportation by any means. Nor can the statute be justified as applying to persons who might be disposed to violent tendencies. It applies to any indictment, at least if the offense is punishable by sentence in excess of one year, and without regard to the violent or non-violent nature of the offense charged.

Where the restriction of a constitutional right is apparent this court has been disposed to grant review and to place a strict burden on those seeking to justify the con-

stitutional restriction. See **United States v. Lovett,** 328 U. S. 303 (1946), involving Bill of Attainder.

2. There is no justification for discrimination against persons under indictment, so as to sanction the curtailment of their constitutional rights. The effect of a statute such as this one is to prejudge the guilt of the defendant and impose an additional burden on him for doing something which has express constitutional sanction. It is a form of double jeopardy. Nor is it necessary. Restrictions on a person under indictment are normally matters to settle between him and the sovereignty returning the indictment. These may include release on bail and, no doubt, restrictions on the carrying or transportation of weapons imposed by the court approving bond. There is no warrant, however, for imposing additional federal sanctions against one who stands unconvicted.

What was said in **Lanzetta v. New Jersey,** 306 U. S. 451 (1939), as to additional burdens on an ex-convict would apply, *a fortiori,* to burdens on a person who has not even been convicted.

3. A criminal statute will be construed in a reasonable manner. **Haynes v. United States,** 390 U. S. 85 (1968). It is not reasonable to assume that Congress, in specifying "indictment", would have had in mind an indictment which is fatally defective under state law, to such an extent that it could not even be corrected by amendment. The court below is wholly in error in its assumption that the defects in the state indictment were merely formal matters which could be cured by amendment. The Missouri Circuit Court held just the contrary, and the correctness of its views under state law is shown in the careful opinion accompanying the order of dismissal. The state did not appeal, no doubt because it was evident that the ruling was correct. The state indictment, moreover,

probably does not comply with elementary standards of due process of law as illustrated by cases such as **Russell v. United States**, 369 U. S. 749 (1962).

Two courts of appeals have indicated that Sec. 902 (e) was intended to apply only to persons who "had legally been charged." See **Quinones v. United States**, 161 F. 2d 79, 81 (1 Cir. 1947); **Schook v. United States**, 337 F. 2d 563, 567 (8 Cir. 1964). To restrict the constitutional rights of a person held on an indictment which is wholly void would be very strange. Such an intention on the part of Congress should not be presumed.

4. If Section 902 (e) is construed so as to apply to an indictment which is wholly insufficient and void, this would constitute an invidious and arbitrary discrimination against unconvicted persons, in violation of the Fifth and Sixth Amendments. There is the opportunity for serious oppression if one's constitutional rights are restricted simply because a state prosecutor has been able to procure a document bearing the name of indictment, but which does not even charge an offense. Second Amendment rights should not be infringed on such flimsy grounds.

It is no answer to say that a person under indictment could procure such weapons as he might need for his own protection in his home state. Courts have taken judicial notice of the fact that weapons are not available in all jurisdictions. **Cases v. United States** (1 Cir. 1942), 131 F. 2d 916. There must be substantial justification for any restriction or dilution of constitutional rights.

5. The questions in this case are important questions of federal law which have not been, and should be, determined by this court. There is much discussion of problems relating to firearms (as is shown by the widely-reported trial and conviction of H. Rap Brown, apparently under the

same section of the statute as is involved here.) It is important both to the government and to the public that the scope and limits of statutes such as these be known. The Second Amendment has importance, as do all parts of the Bill of Rights. The case is appropriate for review.

Respectfully submitted,

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## APPENDIX A.

### Opinion of Court of Appeals.

United States Court of Appeals
For the Eighth Circuit.

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No. 18,805.

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Robert Bolivar DePugh,
Appellant,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

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[April 15, 1968.]

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Before Van Oosterhout, Chief Judge; Mehaffy and Heaney, Circuit Judges.

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Per Curiam.

On January 31, 1967, defendant Robert Bolivar DePugh was sentenced upon his plea of *nolo contendere* to a one-count indictment alleging a violation of 15 U. S. C. A., § 902 (e), charging that he transported a revolver in interstate commerce while under state indictment for a crime punishable by imprisonment for a term exceeding one year.[1]

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[1] 15 U. S. C. A., § 902 (e):

"It shall be unlawful for any person who is under indictment or who has been convicted of a crime punishable by imprisonment for a term exceeding one year or who is a fugutive (sic) from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition."

This appeal arises from the March 8, 1967 orders of the district court overruling defendant's timely motions for new trial and in arrest of judgment. We affirm the judgment of conviction.

Defendant's various arguments raise the sole issue of the sufficiency of the federal indictment. This court is not foreclosed by a plea of *nolo contendere* from considering the sufficiency of the indictment. *Melrose Distillers, Inc. v. United States,* 258 F. 2d 726 (4th Cir. 1958). See also *Jaban v. United States,* 333 F. 2d 535 (8th Cir. 1964). The defendant argues that § 902 (e), under which he was indicted by the federal grand jury, requires a valid and legal predicating indictment as one of its elements; that the state indictment returned on August 16, 1965, and quashed on March 9, 1967, was defective; that it was null and void as it failed to allege possession of a bomb with intent to use it unlawfully against the person or property of another, an alleged essential ingredient of the Missouri statute.[2] This argument was first raised in the defendant's pretrial motion to dismiss the indictment which was overruled by District Judge Elmo B. Hunter in a memorandum and order dated January 27, 1967 and reported as *United States v. DePugh,* 266 F. Supp. 453 (W. D. Mo. 1967).

The state indictment pending at the time of defendant's sentence in federal court, omitting its formal parts, reads as follows:

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[2] V. A. M. S., § 564.580:

"Possession or Control of Bomb Prohibited—Penalty

"Every person who has in his possession or under his control a bomb or bombshell, or who carries or possesses any explosive substance with intent to use the same unlawfully against the person or property of another, is guilty of a felony, and upon conviction therefor, shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than ten years. . . . provided, that this section shall not apply to the lawful possession of bombs or bombshells by peace officers or by members of military forces in the regular discharge of their duties as such."

"The Grand Jurors for the State of Missouri, duly summoned from the body of said County of Jackson, being duly impaneled, sworn and charged to inquire within and for said County, upon their oaths present and charge that at the County of Jackson and State of Missouri, on or about the 9th day of July, 1965, one ROBERT B. DEPUGH, whose more true and full name is unknown to the members of the Grand Jury, did then and there unlawfully, wilfully and feloniously have in his possession and under his control various bombs and bomb shells; against the peace and dignity of the State."

The state indictment was predicated on V. A. M. S., § 564.580, and although not in the language of the statute did charge that the defendant "unlawfully, wilfully and feloniously" had in his possession and under his control various bombs and bombshells. The experienced district judge was of the opinion that the indictment was proper and valid on its face.[3] However, on March 9, 1967, some thirty-seven days after sentencing on the federal plea, the state court quashed the indictment on motion of defendant.

The record before us does not show whether at that late date the state prosecutor resisted the motion to quash the state indictment, but under Missouri law a substitute information could have been filed if the state indictment was insufficient either as to form or substance. The Missouri statute, V. A. M. S., § 545.300 provides:

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[3] "The state indictment appears to be proper and valid on its face. It charges a state felony. One and one-half years after it was returned it has not been held invalid. The state indictment charges a violation of section 564.580, R. S. Mo. 1959 which reads in part: 'Every person who has under his control a bomb or bombshell, * * * is guilty of a felony * * * (punishable) by imprisonment in the penitentiary for a term not less than two nor more than ten years.'" *United States v. DePugh*, 266 F. Supp. 453, 455, n. 2 (W. D. Mo. 1967).

"§ 545.300. Informations—amendment—substitution for defective indictment.

"An information may be amended either as to form or substance at any time before the jury is sworn, but no such amendment shall be allowed as would operate to charge an offense different from that charged or attempted to be charged in the original information. *If an indictment be held to be insufficient either as to form or substance, an information charging the same offense charged or attempted to be charged in such indictment may be substituted therefor at any time before the jury is sworn.* No amendment of the information or substitution of an information for an indictment as herein provided shall cause a delay of the trial unless the defendant shall satisfy the court that such amendment or substitution has made it necessary that he have additional time in which to prepare his defense." (Emphasis added.)

We think this statute is a complete refutation of defendant's contention for reversal, which is based on the asserted invalidity of the state indictment. The state indictment returned against defendant on August 16, 1965 carries a minimum sentence of two years. This indictment was pending when defendant was alleged to have transported the revolver from Des Moines, Iowa to Kansas City, Missouri, in interstate commerce between the dates of July 23, 1966 and August 20, 1966. The state indictment was pending when defendant entered his plea of *nolo contendere* and was sentenced to the custody of the Attorney General for a term of one year on January 31, 1967 in the district court. It was not until March 9, 1967 that the state indictment was quashed. Defendant had by this time been convicted in the present case, and also on January 17, 1967 he had been convicted and sentenced upon three counts of an indictment by trial to a jury in the same federal district court. When the state indictment was

quashed, the prosecutor could have filed a substitute information to correct any defects in the indictment if he wished. We have no knowledge why the state did not substitute an information and prosecute the defendant when the indictment was quashed. The indictment pended for about fifteen months and no state action was taken. It could well have been that the state's inactivity was by reason of its knowledge of some of the federal charges as it is not uncommon for state charges to be sometimes dropped when the same defendant has been convicted or sentenced under a federal charge. Whatever the motivation, it could not have had any effect upon the validity of the federal indictment. The United States was not a party to the state proceeding and could not take any action to support the validity of the state indictment, and therefore could not be affected by the decision of the Missouri court to which it was not a party. *United States v. Luros*, 243 F. Supp. 160 (N. D. Iowa, 1965).

We assume for purposes of this decision that the state indictment was defective, but at most it was voidable and not void because of the Missouri statute permitting substitution of an information to cure the defects. We have heretofore held in *Schook v. United States*, 337 F. 2d 563, 567 (8th Cir. 1964), that the federal Act applied to informations as well as indictments and that:

> "Congress plainly sought to protect the public by proscribing the transportation of firearms by convicted felons or those charged with felonies without attaching any significance to the procedural vehicle forming the basis of the charge. It would therefore emasculate Congress' purpose for us to distinguish between persons lawfully charged with a felony by 'information' and those charged by 'indictment.'"

There does not appear to be any reported case precisely in point challenging a conviction under federal indictment which is based on a state indictment that is subsequently

quashed. Common sense, however, dictates that federal law enforcement should not hinge on the outcome of a state charge, whether by acquittal, nolle prosequi or quashing of the indictment. If such were the law, the federal government would have to await the state trial and any appeals that might follow before federal law enforcement could be attempted. Such frustration of the federal legal processes finds no support in law or common sense. The court stated in *United States v. Luros, supra* at 168:

> "The United States was not a party to the California prosecution, and its power to enforce its criminal laws cannot be affected by the decision of a state court in a case to which it was not a party."

Our view is that the rationale in *Goodwin v. United States,* 185 F. 2d 411 (8th Cir. 1950), is applicable here.[4] Defendant in *Goodwin* was convicted in the federal district court of escaping from jail while being held to answer an indictment in a federal district court in Florida which was later dismissed. This court held that the subsequent dismissal of the Florida indictment did not affect the validity of the conviction for escape. See also and compare *United States v. Sutton,* 363 F. 2d 845 (4th Cir. 1966), cert. denied, 385 U. S. 1014 (1967), where it was held that defendant's conviction of interstate transportation of falsely made securities was not barred by an acquittal in the state court of charges of having stolen and received the same securities.

The trend for many years has been to simplify procedure, particularly with respect to language used in indictments to further the ends of justice. Under Missouri law the state indictment was not void *ab initio,* but only voidable, since the indictment could have been corrected

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[4] See also and compare the later case of *Boydston v. Wilson,* 365 F. 2d 238 (9th Cir. 1966).

by substituting an information, if necessary. As long as the indictment was pending in state court, violation of the federal statute by defendant subjected him to the indictment and conviction from which he appeals. All of the elements of the federal crime were included in the federal indictment since the state indictment was pending at the *time of the* federal indictment.

Section 902 (e) is a part of the "Federal Firearms Act." Its adopted purpose was aptly stated by the court in *Cases v. United States,* 131 F. 2d 916, 921 (1st Cir. 1942), cert. denied, as *Velazquez v. United States,* 319 U. S. 770 (1942):

> "In the Act Congress sought to protect the public by preventing the transportation and possession of firearms and ammunition by those who, by their past conduct, had demonstrated their unfitness to be entrusted with such dangerous instrumentalities, and certainly no one can seriously contend that the test of unfitness which Congress established is irrelevant to this purpose."

The Missouri indictment fully apprised defendant of the state charge as therein described and to predicate a reversal of the federal conviction on inept draftsmanship or failure to substitute a more detailed averment of intent in an information, or for any subsequent disposition resulting from the state charge, would, in our view, constitute a miscarriage of justice.

We note that the sentence in this case of one year was made to run concurrently with sentences imposed in Counts I and II in case No. 18,732, presently pending in this court. The sentencing court also provided that in the event of the "overturning" of case No. 18,732, the sentence in this case was to commence when "that fact is known."

The judgment of conviction is affirmed.

## APPENDIX B.

### Judgment.

(Filed Apr. 15, 1968, Robert C. Tucker, Clerk.)

United States Court of Appeals
For the Eighth Circuit.

No. 18,805. September Term, 1967.

Robert Bolivar DePugh,
Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Western District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

April 15, 1968.

Order entered in accordance with Opinion:

Robert C. Tucker,
Clerk, U. S. Court of Appeals
For the Eighth Circuit.

## APPENDIX C.

**District Court Opinion Reported as United States v. DePugh, 266 F. Supp. 453 (W. D. Mo. 1967).**

In the United States District Court for the Western District of Missouri, Western Division.

United States of America,
Plaintiff,
vs.
Robert Bolivar DePugh,
Defendant.
} 22288.

MEMORANDUM AND ORDER.

(Filed Jan. 27, 1967.)

Defendant Robert Bolivar DePugh has filed a motion to dismiss alleging that the indictment (1) does not state facts sufficient to constitute an offense against the United States; (2) is based on a statutory section (Title 15, Section 902 (e) U. S. C.) that is unconstitutional by denying equal protection of the laws and stripping defendant of his "presumption of innocence until proven guilty beyond a reasonable doubt" to the charge pending in the Jackson County, Missouri Circuit Court; and (3) that the indictment in this Court is invalid because it is based on an invalid state indictment that is under attack.

Defendant did not wish an evidentiary hearing on his motion but relied on his contentions as presenting legal questions only.

Neither the motion nor the accompanying brief undertakes to illuminate defendant's contention that the indictment does not state sufficient facts. The Federal Fire-

arms Act (52 Stat. 1250; 15 U. S. C. 902 (e)) provides: "It shall be unlawful for any person who is under indictment . . . of a crime punishable by imprisonment for a term exceeding one year to ship, transport, or cause to be shipped and transported in interstate or foreign commerce any firearm or ammunition." The indictment clearly and plainly charges a violation of this section of the statute, and does state facts sufficient to constitute an offense against the United States. See, Downing v. United States, 348 F. 2d 594 (5th Cir. 1965), cert. den., 382 U. S. 901. Schook v. United States, 337 F. 2d 563, 567 (8th Cir. 1964); Willis v. United States, 289 F. 2d 581, 584 (8th Cir. 1961).

Defendant's second contention is that the statute is unconstitutional, viz, an unlawful classification thus denying equal protection. Congress in its wisdom has set up two classes of persons which it deems to be of such special risk to law and order as to be denied the right to carry firearms in interstate commerce. The first class is those who have been convicted of a felony. It appears to be well established that this is a lawful classification. Congress has as its second classification denied the right to those who are under indictment for an offense punishable by imprisonment for a term exceeding one year or who are fugitives from justice. Thus, by this statute, and its classification Congress has sought to protect the public by preventing the described transportation and possession of firearms and ammunition by those who, by their past conduct have demonstrated or indicated their unfitness to be entrusted with such dangerous instrumentalities. A person who is under indictment for alleged commission of a crime punishable by imprisonment for a term exceeding one year, or who is a fugitive from justice presents more than ordinary risk (even though he might later not be convicted of the offense charged) in transporting or possessing firearms. At least Congress must have so believed

as a basis of this classification[1] Grand jury procedure is established by law and is such as to minimize mistake or error. Grand jury indictments result only after careful consideration of evidence by the grand jurors. It is arguably not unreasonable to deprive a person of the right to carry in interstate commerce firearms while the indictment is pending. Schook v. United States, supra; Quinones v. United States, 161 F. 2d 79, cert. den., 331 U. S. 833, 67 S. Ct. 1513; Braswell v. United States, 224 F. 2d 706 (10th Cir. 1955).

This Court is governed by the fundamental rule of statutory construction that a presumption of validity attaches to an Act of Congress, and that such presumption is not lightly overcome. See, United States v. National Dairy Corp., 372 U. S. 29, 32 (1963), rehearing denied, 372 U. S. 961; McMahon v. City of Dubuque, Iowa, 255 F. 2d 154,

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[1] The legislative history of the Federal Firearms Act shows that it was designed to regulate the manufacture of and the shipment through interstate commerce of all firearms:

> "The committee has given much thought to coping with the firearms situation and to studying the best practicable means of combating it. It is believed that the bill above referred to will go far in the direction we are seeking and will eliminate the gun from the crooks' hands, while interfering as little as possible with the law-abiding citizen from whom protests have been received against any attempt to take from him his means of protection from the outlaws who have rendered living conditions unbearable in the past decade." Senate: S. Rept. 82, 75th Cong., 2 (1937).

When the 1961 Amendment to the Act was under consideration, the Senate Report contained the following statement:

> "Over the past few years the infiltration of racketeering into our society and the exploding crime rate have increasingly become a cause for national concern. New laws are needed to give the Federal Bureau of Investigation additional jurisdiction to assist local authorities in the common assault against Crime. S. 1750, introduced at the request of the Attorney General as an integral part of an anti-crime legislative program, would be such a law. Additionally, it would make it more difficult for the criminal elements of our society to obtain firearms." Senate: S. Rept. 364, 87th Cong., 2 (1961).

160 (8th Cir. 1958), cert. den., 358 U. S. 833. So long as a rationally sound basis exists for the congressional determination or classification, that determination is within the constitutional power of Congress. Eagan v. United States, 173 F. 2d 369, 375 (8th Cir. 1943), cert. den., 320 U. S. 788; Stutz v. Bureau of Narcotics, etc., 56 F. Supp. 810, 813 (N. D. Calif. 1944). It is a matter of legislative judgment. See, Kentucky Ship and Collar Co. v. Illinois Central Railroad Co., 299 U. S. 334 (1937).

Federal power to regulate interstate commerce in firearms by means of the Federal Firearms Act has been upheld many times since its enactment in 1938. See, Cases v. United States, 131 F. 2d 916 (1 Cir. 1942), cert. den., 319 U. S. 770, rehearing denied, 324 U. S. 889.

Defendant's third contention is that the indictment is invalid because it is based in part on an "invalid" state indictment that is under attack.[2] The crime charged in the indictment in this case was complete if a firearm was transported in interstate commerce while the transporter was under indictment. What may later occur to the state indictment, which on its face appears regular and charges a state felony involving maximum punishment of more than one year, is immaterial. This is clearly demonstrated by the Fugitive Felon Act which likewise involves the possibility that the fugitive who travels in interstate commerce to avoid prosecution for a felony may never in fact be prosecuted or found guilty upon such prosecution. The Courts have upheld the Fugitive Felon Act against constitutional attack of the instant nature. See Lupino v.

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[2] The state indictment appears to be proper and valid on its face. It charges a state felony. One and one-half years after it was returned it has not been held invalid. The state indictment charges a violation of section 564.580, R. S. Mo. 1959 which reads in part: "Every person who has under his control a bomb or bombshell, . . . is guilty of a felony . . . (punishable) by imprisonment for a term not less than two nor more than ten years."

United States, 268 F. 2d 799 (8th Cir. 1959); United States v. Brandenburg, 144 F. 2d 656 (3rd Cir. 1944); United States v. Miller, 17 F. Supp. 65 (W D. Ky. 1936); Azzone v. United States, 341 F. 2d 417 (8 Cir. 1965), cert. den., 381 U. S. 943; Hermans v. United States, 163 F. 2d 228 (6th Cir. 1947), cert. den., 322 U. S. 801, rehearing denied, 322 U. S. 821.

While the 8th Circuit Court of Appeals has never had the precise question before it, in considering other questions it has used language supporting the validity of the questioned provision of the statute. See, Schook v. United States, 337 F. 2d 563 (8th Cir. 1964) and cases there cited, especially Braswell v. United States, 224 F. 2d 706 (10 Cir. 1955). And see, Deckard v. United States, 260 F. Supp. 565 (E. D. Mo. 1966).

In summary, the motion of defendant to dismiss the indictment is found to be without merit and is overruled and denied.

Elmo B. Hunter,
Judge.

## APPENDIX D.

In the Circuit Court of Jackson County, Missouri.

State of Missouri,
Plaintiff,
vs.
Robert Bolivar De Pugh,
Defendant.

No. C-34597.
Division 15-B.

**Findings and Order Sustaining Defendant's Supplementary Motion to Dismiss Indictment and Quash Proceedings.**

Now, on this 9th day of March, 1967, pursuant to Notice, the Court takes up the motion of defendant Robert Bolivar DePugh to dismiss indictment and quash proceedings.

The state is present by Mr. Joel Pelofsky, Assistant Prosecuting Attorney for Jackson County, Missouri, and the defendant is present by his attorneys, John Pohlmann and William Gilwee. Legal briefs of counsel were presented, considered, argued and heard; no evidence relating to the motion was presented by either party. The sole question for consideration is that presented by Paragraph 3 of defendant's motion, to-wit, whether the indictment found against the defendant, Robert Bolivar De Pugh, is set out with sufficient particularity to inform him of the offense with which he is charged.

The indictment undertakes to charge the defendant DePugh under Section 564.580, Revised Statutes of Missouri 1959. The relevant portions of that statutory section recite:

> "Every person who has in his possession or under his control a bomb or bombshell or who carries or

possesses any explosive substance *with intent to use the same unlawfully against the person or property of another,* is guilty of a felony, et cetera."

The indictment returned against the defendant recites:

". . . that at the County of Jackson and State of Missouri, on or about the 9th day of July, 1963, one Robert B. De Pugh, whose more true and full name is unknown to members of the Grand Jury, did then and there unlawfully, wilfully and feloniously, have in his possession and under his control various bombs and bombshells; . . ."

The indictment is signed by Alfred O. Hardy, then Assistant Prosecuting Attorney, and certified as a true bill under the signature of William M. Burke, Foreman. The indictment is fatally defective. It does not contain an essential element of the statutory offense, to-wit: "Intent to use the same unlawfully against the person or property of another."

The element of intent is a matter of substance and is required to be contained in the charge made against the person with definiteness and certainty.

A defendant's Constitutional right to understand the nature and cause of the action against him means that he must be definitely informed as to the nature of the charge so that he may prepare his defense and so that the proceedings, when determined, will constitute a complete bar to another prosecution for the same offense. Article 1, Secs. 18, 19, Constitution of Missouri, 1945, VAMS; *State v. Harris, 313 S. W. 2d 664.* The authorities sustaining this requirement are too numerous and too universely acknowledged to require further recitation of them.

Where a statute, such as Section 564.580, R. S. Mo. 1959, makes a particular intention essential, it is necessary to allege the intent with directness and precision. The stat-

utory section under the sanction of which the indictment was returned specifically requires that the possession or control of a bomb or bombshell be coupled with the intent to use the same unlawfully against the person or property of another in order that a violation of the law be established. The element of intent was not charged against this defendant by the indictment. Nor, do we believe, that the indictment is susceptible of amendment by information in lieu thereof.

Accordingly, the defendant's supplementary motion to dismiss the indictment and quash proceedings is by the court sustained on the grounds herein stated.

It Is Therefore Ordered and Adjudged that the indictment herein against the defendant, Robert Bolivar De Pugh, be and is hereby dismissed and the proceedings against him pursuant to said indictment be quashed.

S/ Charles Shangler,
Judge.

Dated this 9th day of March, 1967.

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No. 169

# In the Supreme Court of the United States

OCTOBER TERM, 1968

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ROBERT BOLIVAR DEPUGH, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ERWIN N. GRISWOLD,
*Solicitor General,*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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On September 30, 1966, a one-count indictment was returned against petitioner in the United States District Court for the Western District of Missouri charging that, while under indictment by the State of Missouri for "unlawfully, wilfully, and feloniously having in his possession and under his control various bombs and bomb shells" in violation of Section 564.-580, Missouri Revised Statutes, a crime punishable for a term exceeding one year, petitioner wilfully

caused the transportation of a revolver in interstate commerce, in violation of the Federal Firearms Act, 15 U.S.C. 902(e)[1] and 18 U.S.C. 2 (I R. I). On January 27, 1967, the district court denied petitioner's motion to dismiss the indictment, rejecting his claim that the underlying state indictment (against which a motion to dismiss was then pending) was invalid and that the federal statute was unconstitutional as applied (266 F. Supp. 453; Pet. App. C, 19-23). On January 31, 1967, petitioner entered a plea of *nolo contendere* to the federal charge (I R. I 21; II R. 6) and was sentenced to imprisonment for one year, the sentence to run concurrently with the sentences imposed under a related federal conviction (I R. I 21; II R. 8-9).[2]

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[1] 15 U.S.C. 902(e), as amended in 1961 (75 Stat. 757), provides: "It shall be unlawful for any person who is under indictment or who has been convicted of a crime punishable by imprisonment for a term exceeding one year or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition."

[2] That case—involving conviction on various counts charging violations of provisions of the National Firearms Act, *i.e.*, 26 U.S.C. 5811, 5821, 5841—is presently pending on appeal in the Eighth Circuit. *DePugh* v. *United States*, No. 18,732 (C.A. 8).

At the time of sentencing in this case, government counsel advised the trial court that if the case had gone to trial it would have been proved that on July 23, 1966, petitioner purchased eight revolvers in Des Moines, Iowa, and that on August 20, 1966, he was arrested in possession of certain of these weapons in Missouri, under an indictment charging conspiracy and substantive violations of the National Firearms Act.

On March 9, 1967, about a month after the imposition of sentence and notice of appeal, the Circuit Court of Jackson County, Missouri, sustained petitioner's motion to dismiss the state indictment and quashed that indictment on the ground that it did "not contain an essential element of the statutory offense, to-wit: 'Intent to use the [bombs and bombshells in petitioner's control and possession] unlawfully against the person or property of another'" (Pet. App. D, 25, 24-26). On appeal from the earlier conviction involved in the instant case, the court of appeals held that the subsequent dismissal of the state indictment did not invalidate the federal charge (Pet. App. A, 11-17).

1. In holding that the defect in the state indictment which led to its dismissal subsequent to petitioner's conviction for violating 15 U.S.C. 902(e) did not render that conviction invalid, the court of appeals was clearly correct. The statute proscribes the transporting or shipping of firearms in interstate commerce by convicted felons, fugitives from justice, and persons, like petitioner, who are under indictment for felonies. Inclusion of the latter category of individuals is entirely consistent with the overall congressional scheme. Congress could reasonably conclude that when persons are under indictment for a serious crime, the potential of their misuse of firearms is great enough to warrant barring their carrying of firearms in interstate commerce. *Schook* v. *United States*, 337 F. 2d 563, 567-568 (C.A. 8); *Quinones* v. *United States*, 161 F. 2d 79, 80-81 (C.A. 1), certiorari denied, 331 U.S. 833. There is thus no need for the

federal court to consider or pass on the ultimate validity of the state indictment. So far as the indictment aspect of the statute is concerned, it results in a limited disability for a short period until the charges in the indictment are terminated by dismissal, acquittal or conviction.[3]

There is no suggestion in the record that the state indictment was procured by fraud or was a mere stratagem utilized to permit invocation of the federal statute. The Missouri indictment was returned by a regularly constituted grand jury. That body necessarily found that there was probable cause to believe that a felony had been committed by petitioner. Petitioner was subject to this indictment at the time he committed the federal offense and at the time of his conviction on the federal charge. In these circumstances, as the court of appeals pointed out, the fact that the indictment was ultimately dismissed because of "inept draftsmanship" provided no basis for retroactively immunizing petitioner from federal prosecution (Pet. App. A, 17).[4] Cf. *Braswell* v. *United*

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[3] Moreover, as the court of appeals noted (Pet. App. A, 16), "Common sense * * * dictates that federal law enforcement should not hinge on the outcome of a state charge * * *."

[4] While the Missouri court stated that the indictment was "fatally defective" and suggested that it could not be amended by information (Pet. App. D, 25, 26), that hardly renders the federal conviction retroactively invalid. As the court of appeals stated (Pet. App. A, 17): "As long as the indictment was pending in state court, violation of the federal statute by defendant subjected him to the indictment and conviction from which he appeals. All of the elements of the federal crime were included in the federal indictment since

*States*, 224 F. 2d 706, 710 (C.A. 10), certiorari denied, 350 U.S. 845.

2. Contrary to petitioner's contention (Pet. 6-7), the statute as thus construed does not violate the Second Amendment right to bear arms. *Cases* v. *United States*, 131 F. 2d 916, 921-922 (C.A. 1), certiorari denied, *sub nom. Velazquez* v. *United States*, 319 U.S. 770; *Tot* v. *United States*, 131 F. 2d 261, 266-267 (C.A. 3), certiorari denied on this issue, 317 U.S. 623, reversed on other grounds, 319 U.S. 463.

The Second Amendment provides:

> A well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Courts which have construed this constitutional provision have held that it confers rights not on individuals, but "as a protection for the States in the maintenance of their militia organizations against possible encroachment by the federal power." *United States* v. *Tot*, *supra*, 131 F. 2d at 266, and authorities there cited; see also *United States* v. *Cruikshank*, 92 U.S. 542, 553; *Presser* v. *Illinois*, 116 U.S. 252, 265.

In any event, the rights conferred by the Second Amendment are not absolute. *Robertson* v. *Baldwin*, 165 U.S. 275, 281-282; *Konigsberg* v. *State Bar of California*, 366 U.S. 36, 50, n.10. Congress could properly, in exercise of its power under the Commerce Clause, impose restrictions against the transportation of guns as an aid to local law enforcement. See

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the state indictment was pending at the *time of the* federal indictment."

*Brooks* v. *United States*, 267 U.S. 432, 436; *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 253-257, and cases there cited.

3. Finally, petitioner's other constitutional claims (Pet. 7, 8) are without substance. 15 U.S.C. 902(e) does not sanction a curtailment of constitutional rights by discriminating in an invidious manner against those under felony indictments. The congressional classification is a demonstrably reasonable one (see *supra*, p. 3), and in no respect constitutes a prejudgment of guilt on the charge stated in the underlying indictment.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[5]

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*Solicitor General.*

FRED M. VINSON, JR.,
*Assistant Attorney General.*

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JULY 1968.

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[5] Petitioner is presently a fugitive under an indictment returned in February 1968 charging conspiracy to commit bank robbery in the United States District Court for the Western District of Washington. He is believed to be hiding in Canada. While he is not in default in this case, since he was on bond pending appeal, we bring these facts to the attention of the Court since it will not ordinarily consider a case when the defendant is a fugitive. See *Eisler* v. *United States*, 338 U.S. 189; but cf. *Doyle* v. *United States*, certiorari denied, 382 U.S. 843, where the Court denied a petition even though the defendant was a fugitive.

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